Office-Supreme Court, U.S.
FILED
FEB 25 1983
STEVAS,
CLERK

No. 82-26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT STATE OF NEVADA

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QUESTION PRESENTED

For reasons which are made clear in the body of this brief, the State of Nevada does not believe that the Question Presented by the Tribe are properly before the Court on this record. Rather, Nevada feels that a more accurate statement of the Question Presented in the Tribe's Cross-Petition would be as follows:

> Whether the res judicata effect of the 1944 decree in a suit quieting title to water rights in the Truckee River in Nevada bars the Pyramid Lake Paiute Tribe of Indians from now asserting an alleged reserved right to Truckee River water for fishery purposes when in the prior suit:
>
> (a) the Tribe was represented by the United States, no claim of fraudulent or collusive misrepresentation has been made, the District Court found that the United States representation was proper and ethical, and the Court of Appeals did not overrule that finding;
>
> (b) the United States asserted, and the District Court found, a full Federal reserved water right on behalf of the Indians for all primary purposes for which the Indians' Reservation had been established;
>
> (c) the Tribe was aware of the case and could have intervened but did not do so;
>
> (d) all parties to the litigation and subsequent appropriators in privity with them have relied upon the finality of the Final Decree for decades; and
>
> (e) a water right for fishery purposes would require proof in a new suit of the same essential facts that were alleged and litigated when the United States previously claimed a full Federal reserved water right for the Indians.

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BRIEF FOR RESPONDENT STATE OF NEVADA

STATEMENT OF THE CASE

We have previously described the relevant facts in this case.[1] We deal here only with certain limited errors in the statement of the case presented by the Pyramid Lake Paiute Tribe of Indians ("the Tribe" or "the Indians")[2] in the brief supporting the cross-petition ("Tribe's Brief").

The record does not support the Tribe's theory that the Government limited the claims for the Pyramid Lake Reservation so as not to conflict with the rights claimed for the Newlands Reclamation Project. The Government attorney who commenced *Orr Ditch*[3] specifically

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[1] Nevada's opening brief as petitioner in No. 81-2245 (hereinafter "Nev. Brief") at 2-22.

[2] The Tribe was incorporated in 1936, but the Pyramid Lake Indians were recognized as a separate and distinct tribe as early as 1859. Nev. App. 183a.

[3] *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. 1944) (*"Orr Ditch"*).

recognized the importance of the Reservation water rights and sought to establish them to the fullest extent possible. JA 269. He determined that the Truckee River would support full claims for the Reservation and the Project, but took care to obtain the independent approval of the Commissioner of Indian Affairs as to the extent of the Reservation claim. JA 313-316; *see also* Nev. App. 203a-204a. The Government recognized that if there was insufficient water, the water for the Project, not the Reservation, would be curtailed. JA 316. Through the Truckee River Agreement, over the initial objections of counsel for the Truckee-Carson Irrigation District ("TCID"), the Government successfully increased the water right for the Reservation. *See* Nev. Brief at 35.

The Indians' fishing was specifically pleaded in the Government's complaint (Nev. App. 6a; *see also* Nev. App. 185a), and evidence of the Indians' fishing was received in *Orr Ditch*. *See* Ex. A-99010, pp. 33, 36, 39, 43; JA 404.[4] Nor was the opportunity to present evidence concluded in 1921. The Special Master specifically provided for reopening the record if any overlooked matter so warranted. Ex. A-14 (see Appendix C for record citations to the introduction of all exhibits). After the entry of the Temporary Restraining Order, the proceedings were specifically left open for any person affected by the order to apply for its amendment, alteration or modifica-

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[4] The Government attorney who wrote that there was nothing in the complaint about fish was contradicted by the very pleading he enclosed with his letter. JA 393. He joined the case after the Special Master had received the evidence. He was correct only in that the Government was not pressing for a discrete fishery right.

The Tribe contends that the United States did not seek a discrete fishery right in *Orr Ditch* because the Government was under the impression that problems with the water could be worked out administratively. Without conceding that this was ever the case, we would point out that once *Orr Ditch* was begun, it was clear to one and all that all the various claims to the Truckee River waters would be untangled in the judicial arena and not administratively.

tion. Nev. App. 186a. The opportunity to raise a discrete fishery claim thus remained open through the hearings that preceeded the entry of the Final Decree in 1944. Exs. B-512, B-515.

The Tribe takes out of context the quotation from the Commissioner of Reclamation that his Bureau would "carefully guard against taking any action which would impair the right of the Indians" to water for fishing. The full exhibit, A-360 (reprinted as Appendix A to this Brief), was a letter to the Assistant Commissioner of Indian Affairs which followed a sequence of letters regarding the concern by the Superintendent of the local Agency and the Indians themselves over water for fish. JA 385-388. The Commissioner of Reclamation stated that the determination of Indian rights was a matter for the *Orr Ditch* court. Having identified that the Indians then had no fishery right, Reclamation, in essence, pledged to Indian Affairs no interference in any right which might be obtained for the Indians for fish. This letter, now put forth by the Tribe, shows even more forcefully the Indian knowledge that action would be necessary in *Orr Ditch* if a fishery claim was to be made and that the Reclamation Bureau was not trying to discourage any Indian claim which the Commissioner of Indian Affairs thought appropriate.

Finally, in *United States* v. *Alpine Land & Reservoir Co.*, —— F.2d —— (No. 81-4084, 9th Cir., Jan. 24, 1983), the Ninth Circuit has recently reviewed and rejected the Tribe's contention that the Newlands Project has engaged in wasteful water practices, specifically rejecting dicta to that effect in its decision in the present case. Nev. App. 245a.[5]

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[5] The Tribe relies on *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972). However, that case was brought against the Secretary of Interior as the sole defendant, concerning his regulation of the water flows into Pyramid Lake. TCID was not a party, and neither its interests nor those of any other water user were represented in the case. The court's order bound the

SUMMARY OF ARGUMENT

Res judicata bars this suit because plaintiffs here are seeking to revive the same cause of action on which the United States sued in *Orr Ditch*. In both cases the matter sought to be adjudicated is the implied Federal reserved water right for the Pyramid Lake Reservation. *See Winters* v. *United States*, 207 U.S. 564, 575-577 (1908). The assertion of that right by the United States on behalf of the Tribe in *Orr Ditch* forecloses plaintiffs from now claiming additional water for fishery purposes under the *Winters* doctrine. *See Heckman* v. *United States*, 224 U.S. 413 (1912).

Both current and older definitions of "cause of action" demonstrate that the present case presents the same cause of action as *Orr Ditch*. Under the modern test of the *Restatement (Second) of Judgments*, plaintiffs' claim for water for a fishery arises out of the same transaction as the *Winters* right claimed in *Orr Ditch* and therefore is merged in the Final Decree. *See* 1 *Restatement (Second) of Judgments* § 24 (1982). The older "same evidence" test leads to the same result: because the evidence needed to sustain the fishery claim would have sustained the *Winters* claim in *Orr Ditch*, plaintiffs are precluded from maintaining this action. *See Restatement of Judgments* § 61 (1942).

Barring suit for water for a fishery does not deny the Tribe procedural due process. The Tribe was fully aware of the *Orr Ditch* action and accepted representation by the United States throughout the proceeding. The United States adequately represented the Tribe there, claiming and winning a generous *Winters* right for the Reservation.

Secretary to the extent of water under his control and did not include water decreed to private owners under the *Orr Ditch* Final Decree or water at the Newlands Project which belongs to the farmer. *Ickes* v. *Fox*, 300 U.S. 82 (1937). The determinations made in a proceeding between the Tribe and the Government have no bearing on the issues now before the Court.

The bare fact that the United States also represented the interests of the Newlands Reclamation Project in *Orr Ditch* does not vitiate the Final Decree. The Tribe has alleged no fraud or collusion on the part of the United States. Nor did the other claimants have any knowledge of any Governmental impropriety that might justify upsetting the Final Decree.

Innocent persons—the *Orr Ditch* defendants, the Newlands Project farmers, the subsequent appropriators, and others—have built the civilization of western Nevada over the past forty years on the basis of the water rights adjudicated in *Orr Ditch*. Their reliance interests are overwhelming in comparison to the Indians' claim for additional water—water that is not even necessary for a viable fishery at Pyramid Lake.

In accordance with principles of both res judicata and procedural due process, the *Orr Ditch* Final Decree must be upheld as the last word on the Tribe's *Winters* right to the waters of the Truckee River.

ARGUMENT

I. INTRODUCTION.

In *Orr Ditch*, the United States brought the most comprehensive quiet title suit it could.[6] Its Amended Complaint and contemporaneous documents recognized that the claim of every person or entity that sought the waters of the Truckee River was adverse to the claim of every other such person or entity.[7] The United States even stated its desire to avoid "a multiplicity of suits." Nev. App. 10a. The Amended Complaint, brought on behalf of the United States in its own right and also on behalf of the Indians, took careful note of the Indians' use of water

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[6] JA 263, 264, 274, 277, 278, 281, 282, 283, 285, 287, 292, 300, 301, 304-305, 308-309, 346, 401-402, 408, 409; Nev. App. 185a, 201a-202a, 224a, 224a-226a.

[7] Nev. App. 9a, 10a; JA 288, 291, 300, 303, 310-311, 417; *see also* JA 197, 208.

for fishing, but also placed the suit in the context of affording the Indians an opportunity to "acquire the art of husbandry and other arts of civilization, and to become civilized * * *." Nev. App. 6a. The injunction in the Final Decree was framed in the broadest possible terms in order to bind not only the named parties but their "servants, agents, attorneys, assigns and *all persons claiming* by, *through* or under *them* and *their successors*." Nev. App. 145a (emphasis added). Since the United States was both a party and a representative of (and attorney for) the Indians, the Final Decree was obviously intended to bind both the United States and the Indians.

In its complaint herein, the United States claimed that "some but not all of the rights to the use of the waters of the Truckee River were decreed" in *Orr Ditch* and that the United States wanted to establish "additional rights", many of which would "carry priority dates earlier than many of the rights decreed" in *Orr Ditch*. Nev. App. 151a-152a. But both courts below held that such "additional rights" could not now be sought. As noted above, they correctly concluded that *Orr Ditch* was a general, all-inclusive water adjudication suit in which the United States had sought to assert as large a water right as possible for the Indians. The District Court put the point succinctly:

> [T]he cause of action sought to be asserted in this proceeding by the plaintiff and the Tribe is the same quiet title cause of action asserted by the plaintiff in *Orr Ditch* for and on behalf of the Tribe and its members, that is, a *Winters* implied and reserved water right for the benefit of the reservation, with a priority date of December 8, 1859, from a single source of water supply, *i.e.*, the Truckee Watershed. The plaintiff and the Tribe may not litigate several different types of water use claims all arising under the *Winters* doctrine and all derived from the same water source in a piece-meal fashion. There was but one cause of action in equity to quiet title in

plaintiff and the Tribe based upon the *Winters* reserved right theory. [Nev. App. 188a.]

Tacitly recognizing that it does not suffice for the United States merely to contend that a claimed fishery right had not been litigated in *Orr Ditch*, the Indians continue to argue in this Court that a conflict of interest was the reason that the United States had not put forward a discrete fishery right in *Orr Ditch*, and that the Indians had thereby been deprived of due process.[8]

We deal with those contentions *infra*. We merely note here that to void the Government's representation simply because the United States had to reconcile a number of competing claims, and to assert those interests which were best for all of its wards, would be to open up to attack virtually all final decrees in which the Government has represented more than one interest. In practically every such case, a party could claim that but for the interests of someone else who was also represented by the Government, that party would have obtained more and better rights than it did. Nothing could be more destructive of the repose that final decrees are supposed to enjoy.

Fishery either was or was not a primary purpose of the setting aside of the Indians' Reservation in 1859.[9] If it

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[8] The Indians conceded that the alleged conflict of interest came about solely by virtue of the fact that the Government was representing both the Indians and other interests. JA 15. They thus ignore the fact that if the Government had an impermissible conflict of interest in *Orr Ditch*, the Indians themselves had a similar conflict, since there were competitive voices within the Reservation seeking the available water. JA 434-437, 515-517; Exs. A-338, U-229.

[9] The record fully supports the proposition that when the Government set aside the reservation, irrigation was the primary purpose which required water. JA 267-268, 381-383, 421-422, 435, 436-437, 515, 516-517; Exs. U-229, U-259. The Government, although wanting to provide access to historical fishing areas, sought to divert the Tribe from dependence on fishing. Nev. App. 183a; JA 505-519. The argument that there was a *Winters* right for fishery purposes at Pyramid Lake was considered and ultimately

was, then when the District Court granted a full *Winters* right in its 1944 Final Decree,[10] the fishery right was subsumed into that Final Decree. If it was not, then no water specifically for the fishery was legitimately part of any *Winters* right, either in 1859, in 1944, or now. Thus, the issue as to the purpose of the Reservation need not be resolved here, because regardless of what that primary purpose was, the Indians' present claim for a fishery is invalid.

Finally, it should be noted that the Tribe intervened in *Orr Ditch* in 1976 and now seeks therein to change from irrigation to fishery the beneficial use of water to which they are entitled under the *Orr Ditch* Final Decree. By petitioning for this use in the *Orr Ditch* case itself, the Tribe recognizes the legitimacy of the Final Decree and its applicability to them. Nev. App. 189a.[11] But they have not waited for the outcome there, and apparently would not be satisfied even if they were successful. Instead, they want to claim *more* water than the court decreed to them in *Orr Ditch*—water that would have to be taken away from the communities and individuals who are now, and have been for almost 40 years, relying on the Final Decree and making their own beneficial use of that water.

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rejected by the Commissioner of Indian Affairs. JA 327-328, 339-341, 357-358, 434-437.

[10] It is clear both from the record and from the rulings of the courts below that the Government did, in fact, seek a full *Winters* right for the Indians in *Orr Ditch*. JA 420-422, 266, 269, 273, 315-316, 382, 397, 403; Nev. App. 187a, 188a, 201a, 202a, 226a.

[11] See note 12 of the Tribe's Brief in Opposition to the Petitions for Writs of Certiorari filed by Nevada and TCID in Nos. 81-2245 and 81-2276. Although the Tribe characterizes its new *Orr Ditch* claim as one to "use the unused portion of the Tribe's agricultural right for fishery purposes", its petition actually seeks to change the use of its present right.

II. BOTH COURTS BELOW CORRECTLY HELD THAT THIS CASE PRESENTS THE SAME CAUSE OF ACTION AS *ORR DITCH*.

Under the doctrine of res judicata, a final judgment on the merits prevents the parties to an action and their privies from making any further claims based on the same cause of action. *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979); *Montana* v. *United States*, 440 U.S. 147, 153 (1979). The judgment concludes the parties "as to every matter which was offered and received to sustain or defeat the claim or demand," as well as "any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876).[12] In this case the Ninth Circuit and the District Court both correctly held that this case presents the same cause of action as *Orr Ditch*. *See* Nev. App. 188a, 224a-226a.[13]

A. The Tribe's Cause of Action Is The Same as That of the United States in *Orr Ditch*.

Relying on *Montana* v. *United States*, *supra*, the Tribe argues that the cause of action asserted directly by the Tribe in the present case necessarily differs from the cause of action asserted by the United States on its be-

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[12] *See generally Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 824-831 (1952); 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.410 (2d ed. 1982 & Supp. 1982-1983) (hereinafter *Moore's Federal Practice*); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4406-4415 (1981 & Supp. 1982) (hereinafter Wright & Miller).

[13] Of course, even if we were to assume that the cause of action here differs from the cause of action in *Orr Ditch*, the defendants in this case still can invoke collateral estoppel to prevent plaintiffs from relitigating the key issues in *Orr Ditch*—namely, the fact, date, purpose, and amount of the reservation of land and appurtenant waters for the Paiute Tribe. *See* Nev. Brief at 36-43 (Nev. Brief at 42, n.52 is supported by Ex. A-99010); note 79 *infra*. See also the treatment of collateral estoppel in the opening brief of Petitioner TCID, which we hereby adopt in its entirety.

half in *Orr Ditch*. Tribe's Brief at 20-22. The Tribe, however, seeks to press *Montana* into a service that this Court clearly did not intend it to perform.

In *Montana* this Court ruled that nonparties who "assume control over litigation" in the first case may be precluded only by collateral estoppel, not res judicata, in the second. 440 U.S. at 154. The Court did not purport to hold—as the Tribe would have it—that a party's cause of action always differs from the cause of action earlier asserted by another on its behalf.[14] Such a ruling would demolish the long-recognized principle—expressly *reiterated* by the Court in *Montana*—that "[u]nder res judicata, a final judgment on the merits bars further claims by parties *or their privies* based on the same cause of action." *Id.* at 153 (emphasis added).[15]

Formal representation by a party of a nonparty in an action is a common example of privity.[16] The United States, as guardian of the Indian nations,[17] has full legal authority to represent them in court. *Heckman* v. *United*

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[14] The Tribe has no separate cause of action from the Government for the claim for a fishery right. Here as an intervenor, the Tribe seeks an equitable or beneficial interest (JA 7, 16) in the same 1859 fishery claim sought by the United States as fiduciary and as legal titleholder of the Executive Order Pyramid Lake Reservation. Nev. App. 151a, 159a, 182a.

[15] *See generally Developments in the Law—Res Judicata*, *supra* note 12, at 855-861; 1B *Moore's Federal Practice*, *supra* note 12, ¶ 0.411[1]; *Restatement of Judgments*, *supra* §§ 83-92; 1-2 *Restatement (Second) of Judgments*, *supra* §§ 34-63; 18 Wright & Miller, *supra* note 12, § 4448.

[16] *See, e.g., Kersh Lake Drainage Dist.* v. *Johnson*, 309 U.S. 485, 489-492 (1940); *Kerrison* v. *Stewart*, 93 U.S. 155, 160 (1876). *See generally Restatement of Judgments*, *supra* § 85; 1 *Restatement (Second) of Judgments*, *supra* §§ 41-42; 18 Wright & Miller, *supra* note 12, § 4454.

[17] *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 15-18 (1831). *See generally* F. Cohen, *Handbook of Federal Indian Law* 40-43, 169-173 (1942).

States, 224 U.S. at 437-445.[18] The Indians therefore are not necessary parties to suits brought by the Government on their behalf. *Id.* at 444-445. Moreover, a judgment carrying res judicata effect as to the United States suing in its representative capacity also binds its nonparty Indian wards. *Id.* at 445-446.[19] Contrary to the Tribe's wishful thinking, this Court's recent decision in *Montana*, far from undermining this authority, reinforces the conclusive effect of representative litigation such as *Orr Ditch*.[20]

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[18] It is highly significant that the *Heckman* case, which deals directly and authoritatively with the very subject matter of the Tribe's cross-petition, is never once cited, distinguished, or even referred to in the Tribe's brief. The Tribe in effect is asking that *Heckman* be overruled without ever mentioning the case.

[19] This Court fully has adhered to the principles of *Heckman*. *See, e.g., Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 & n.12 (1976); *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-370 (1968); *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 717 (1943); *Goat* v. *United States*, 224 U.S. 458, 459-460 (1912).

[20] The Tribe resists the basic fact that the United States represented it in *Orr Ditch* with full legal authority. Rather, the Tribe apparently would have this Court conclude that the United States merely "vicariously" asserted the Tribe's cause of action. *See* Tribe's Brief at 21. The cases on which the Tribe relies, however, do not sustain its theory.

It is true that the unexercised right of the United States to sue on the Indians' behalf with respect to trust property does not deprive the Indians of standing to bring their own actions. *See Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. at 368-372. The actual institution by the United States of an action, however, "necessarily precludes" the Indians from later making similar claims. *Heckman* v. *United States*, 224 U.S. at 446; *accord*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. at 370. Thus even if, as an abstract matter, the Tribe at one time had standing to assert a *Winters* right for the Pyramid Lake Reservation, the United States' suit for such a right in *Orr Ditch* prevents the Tribe from reasserting that claim now.

In addition to *Poafpybitty*, the Tribe cites *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974). There this Court, although implicitly recognizing the Tribe's capacity to sue, did not have occasion to consider whether the United States also could

B. Each Federal Reservation Gives Rise to Only One *Winters* Implied Water Right.

The Tribe would like to avoid the long-established rules against splitting causes of action and splitting theories for relief, clearly enunciated by this Court in *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904). The Tribe repeatedly premises its view that this case presents a new cause of action on the theory that the "fishery water right" asserted in the present case is a separate property right from the "irrigation water right" claimed in *Orr Ditch*. *See* Tribe's Brief at 23-24, 33-34. This argument misconceives the nature of implied Federal reserved water rights. As the Court of Appeals and the District Court both recognized (*see* Nev. App. 188a, 224a-225a), each Federal reservation of land gives rise to but a single implied right to any given source of water.[21]

This Court long has recognized that when the United States sets aside land for a Federal purpose, it impliedly reserves previously unappropriated water appurtenant to the reservation necessary to fulfill that purpose. *See Winters* v. *United States*, 207 U.S. 575-577; Nev. Brief at 24-26. A Federal reserved water right accordingly is based on the fact, date, and purpose of the reservation, and the amount of water necessary to fulfill that purpose.[22]

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have asserted the Indians' possessory rights and, if so, whether Government litigation would have negated the Indians' ability to proceed.

[21] Even if the *Orr Ditch* complaint was limited to claims to the waters of the Truckee River and did not encompass Pyramid Lake as such, the Tribe acknowledges that its asserted fishery water right claim goes primarily to the River flows, on which the Lake level depends. Tribe's Brief at 23.

[22] *E.g.*, *United States* v. *New Mexico*, 438 U.S. 696, 698-700 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138-139 (1976); *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963); *Winters* v. *United States*, 207 U.S. at 575-577; *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334, 336, 339-340 (9th Cir. 1939). *See*

As the Court of Appeals and District Court recognized (*see* Nev. App. 188a, 224a-225a), the right thus established is unitary. In considering a reserved water right claim, this Court always has looked to the reservation as a whole and examined all the primary reasons for its establishment. *See United States* v. *New Mexico*, 438 U.S. at 698-718; *Cappaert* v. *United States*, 426 U.S. at 138, 141; *Winters* v. *United States*, 207 U.S. at 575-577. A Federal reserved water right will be implied only for a principal purpose, not a secondary use. *United States* v. *New Mexico*, 438 U.S. at 702. This Court never has suggested that the United States could litigate the *Winters* right purposes for a particular reservation on a piecemeal basis. Full determination of a Federal implied water right is critical not only to the public, which will rely on that determination, but also to the Government because for any use other than the central purposes of the reservation, the United States must acquire water rights under state law like any other appropriator. *Id.*

Thus, contrary to the Tribe's argument, the scope of the *Orr Ditch* cause of action is not determined or limited by the tracts of land to which the water rights were appurtenant. The "res" put in issue by the United States was the water supply of the Truckee River and its tributaries. JA 288, Nev. App. 10a. Both courts below correctly determined that the *Orr Ditch* cause of action for the Indians was based on the *Winters* right for the Reservation from the Truckee River water supply. Nev. App. 188a, 226a. Understanding the unitary nature of that right necessarily leads to the conclusion that this case presents the same cause of action as *Orr Ditch*.

C. The Fishery Claim Arises Out of the Same Transaction as the Indian Water Rights Claim in *Orr Ditch*.

Since 1938, when the Federal Rules of Civil Procedure abolished the distinction between legal and equitable ac-

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generally 6 *Waters and Water Rights* §§ 510-533 (R. Clark ed. 1972 & Supp. 1978).

tions and liberalized pleading and other procedural requirements, courts increasingly have employed transactional definitions of "claim" and "cause of action."[23] The *Restatement (Second) of Judgments* follows this trend and identifies several considerations to help determine whether multiple claims arise out of the same transaction and therefore are merged in or barred by a final judgment on the merits.[24] We need not belabor this matter, for it is obvious that the asserted claim for a discrete fishery water right arises out of the same transaction as the general claim for a reserved Indian water right in *Orr Ditch*.

First, the facts pertaining to the fishery water right asserted here certainly are "related in time, space, origin, or motivation" to the facts pertaining to the reserved Indian water right claimed in *Orr Ditch*. 1 *Restatement (Second) of Judgments, supra* § 24(2). Each case arises from the identical setting aside by the United States of

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[23] This Court has recognized the legal significance of the common transaction underlying multiple claims in numerous settings. *See, e.g., United Mine Workers* v. *Gibbs*, 383 U.S. 715, 721-725 (1966) (pendent jurisdiction); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 9-14 (1951) (removal); *Reeves* v. *Beardall*, 316 U.S. 283, 284-286 (1942) (partial final judgment).

With the advent of modern procedures, many lower courts have looked to the events from which various claims have arisen in determining whether res judicata bars a second action. *See, e.g., Gasbarra* v. *Park-Ohio Indus., Inc.*, 655 F.2d 119, 121-122 (7th Cir. 1981); *Expert Electric, Inc.* v. *Levine*, 554 F.2d 1227, 1234-1235 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977); *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F.2d 464, 466-471 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Ramseyer* v. *Ramseyer*, 98 Idaho 554, 556-557, 569 P.2d 358, 360-361 (1977) (quiet title action).

Most commentators also favor a transactional view. *See, e.g.*, F. James, *Civil Procedure* § 11.10 (1965); 1B *Moore's Federal Practice, supra* note 12, ¶ 0.410[1]; 18 Wright & Miller, *supra* note 12, § 4407.

[24] 1 *Restatement (Second) of Judgments, supra* § 24.

the Pyramid Lake Reservation for the benefit of the Paiute Indians in 1859. The purposes for which the United States may have established the Reservation, even if multiple, are nonetheless "related." *Id.* The Tribe's effort to parlay the possibility of additional relief for the same act into an altogether new claim is a classic example of splitting a cause of action.[25]

Second, these facts constitute even more than "a convenient trial unit." *Id.* Because of the nature and importance of water rights adjudications, it is crucial to try the entire *Winters* claim for a given reservation in a single action—indeed, to try all claims to a given water source in one suit.[26] As we have shown, *Orr Ditch* was such a comprehensive proceeding. *See* Nev. Brief at 4-8, 12. More importantly, a unitary trial of the facts relating to a Federal reserved water rights claim is required as a matter of law, because the specific purposes for which the reservation was created must be determined before a *Winters* right can be established. *United States*

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[25] Even the original *Restatement of Judgments* illustrates this point: If a plaintiff suffers harm to both his person and his property in an automobile accident and sues only for the harm to his person, a judgment in that action bars him from later suing for the damage to his property. *Restatement of Judgments, supra* § 61 comment a.

[26] *See Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 819 (1976); *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 449 (1916).

Similarly, in actions to quiet title to land, the United States must assert all its claims in one action. *See Northern Pacific Ry. Co.* v. *Slaght*, 205 U.S. 122, 128-133 (1907); *United States* v. *California & Oregon Land Co.*, 192 U.S. at 358; 18 Wright & Miller, *supra* note 12, § 4408 at 65. This proposition is a particular expression of the general rule that "a judgment or decree upon the merits concludes the parties as to all *media concludendi* or grounds for asserting the right, known when the suit was brought." *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319-320 (1927) (explaining *United States* v. *California & Oregon Land Co., supra*); *see Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470, 479 (1930).

v. *New Mexico*, 438 U.S. 696 (1978); *see* Nev. Brief at 24-26.[27]

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[27] The Tribe contends that it would have been "impossible" to include a claim for a fishery water right in *Orr Ditch* for several reasons, all without merit. Tribe's Brief at 27.

First, the Tribe argues that the United States suffered from a disabling conflict of interest. *See id.* at 27-28. As we have shown, however, the Government did nothing inconsistent with its "trust relationship" with the Tribe. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979); *see* Nev. Brief at 43-48. The United States was not the trustee of a common pool of Federal water rights who owed the Tribe notice and an opportunity to contest its ratable share before judicial approval of the water rights "accounts" (*cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)), but rather the legal representative of the Tribe who submitted its particular claim to Truckee River waters, as well as the separate claim of the Newlands Project, for judicial quantification along with the independent claims of the *Orr Ditch* defendants. Nor was the United States a putative representative of the "class" of Paiute Indians, with conflicting interests that prevented it from binding the Tribe to the *Orr Ditch* Decree (*cf. Hansberry* v. *Lee*, 311 U.S. 32 (1940)), but rather the longstanding protector of tribal rights who properly discharged its duty of representation and thus bound the Tribe to the judgment.

None of the lower court cases cited by the Tribe has undermined the basic rule established by this Court that in a quiet title action the United States must present its multiple claims and may not thereafter assert any omitted. Of course, the interests of the Project and the Tribe were sufficiently adverse that if the Tribe had sought to intervene, it could have done so. *See New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Nev. App. 186a; *cf. Manygoats* v. *Kleppe*, 558 F.2d 556, 558-559 (10th Cir. 1977) (because duties of Secretary of Interior under NEPA are not necessarily coincidental with interests of Tribe in mining agreement, Tribe is necessary, though not indispensable, party in suit by individual Indians against Secretary to enjoin performance of agreement); *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, 459 F.2d 1082, 1085 (9th Cir. 1972) (when Attorney General previously had defended United States against Indian claim, Indians could not force Attorney General to represent them on same claim against another defendant).

The Tribe's conflict of interest argument, moreover, proves too much. If the court on its own initiative would have had to prevent the Justice Department from asserting a fishery water right, it had

Third, the parties expected that *Orr Ditch* conclusively would determine all water rights in the Truckee River, including all Federal reserved water rights. *See* 1 *Restatement (Second) of Judgments*, *supra* § 24(2). Both courts below agreed that all concerned intended *Orr Ditch* to be a comprehensive action. Nev. App. 185a, 225a.[28] As we have seen, the United States' representation of multiple interests was entirely proper. *See* Nev. Brief at 44-48.[29] The *Orr Ditch* litigants had no reason

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an equal obligation to question the Government's presentation of any of the inherently adverse water rights claims of the Tribe and the Project. Even the Tribe does not wish thus to upset its existing irrigation water right. *See* Tribe's Brief at 27 n.16.

Second, the Tribe contends that a fishery water right would not have been justiciable in *Orr Ditch*. Tribe's Brief at 28-30. As we have shown, however, the requisite adversity did exist between the Tribe and the Newlands Project farmers in *Orr Ditch*. Nev. Brief at 28-35. Formal joinder not only was unnecessary to make their respective water rights claims justiciable (*see id.* at 31 & n.36, 45-46), but would have been impossible. *Id.* at 46-48.

The Tribe's justiciability theory, moreover, again carries it too far. If justiciability of the claims of the Project and the Tribe depended on representation "by separate and independent counsel" (Tribe's Brief at 29), not only would the fishery water right asserted here have been nonjusticiable, but the actual quantification of their respective water rights in the Final Decree is—much to the surprise of western Nevada—merely an "advisory opinion." *Id.*

[28] This Court will not disturb the concurrent findings of two lower courts "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950). Even the Tribe concedes that no error exists in these findings. *See* Tribe's Brief at 30-31.

[29] The Tribe attempts to argue that "[t]he United States did not appear in *Orr Ditch* in its capacity as trustee of the Tribe's fishery water right" (Tribe's Brief at 37), and, therefore, that the United States now can bring the present action in that "capacity" without violating the rule against splitting a cause of action. *Id.* at 31-34. Both the United States and the Tribe admitted in their Answers to Interrogatories in this case, which were admitted into evidence as admissions against interest, that the United States

to believe that the Final Decree would be anything but conclusive as to all interests in the Truckee River.[30]

Application of the considerations identified in the *Restatement* to the facts of this case thus demonstrates that the asserted fishery water right arises out of the same "transaction" as the *Winters* right claimed for the Reservation in *Orr Ditch*. 1 *Restatement (Second) of Judgments, supra* § 24. Although the United States did not seek water specifically for fishery purposes in *Orr Ditch*,[31]

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represented the Tribe in a fiduciary capacity in the instant case and "purported" to represent the Tribe in the *same* capacity in *Orr Ditch*. Exs. A-17, A-19. Even more to the point, however, the asserted "fishery water right" is not a separate property right and cannot be split from the general *Winters* right already asserted.

[30] Even on the assumption that the United States had failed to uphold its duty to the Tribe, both courts below concluded that the *Orr Ditch* defendants had had no knowledge of any Governmental impropriety that would have prevented them from reasonably believing that the nonparties represented by the Government would be bound by the *Orr Ditch* Decree. *See* Nev. App. 191a, 238a, *as modified*, 258a. The Tribe did not challenge the District Court finding on appeal (Nev. App. 238a), and cannot raise this issue again before this Court by casting it in terms of the parties' expectations. *See* Tribe's Brief at 33-34 & n.20. Even if the Tribe had preserved this issue for appeal—which it has not—this Court would be faced with the concurrent findings of two lower courts.

Even if the plethora of laws and cases cited by the Tribe should have led the *Orr Ditch* defendants to deduce that the Government was inadequately representing the Tribe—which we dispute—they would have had no reason to expect that the Tribe's remedy would be to reopen the *Orr Ditch* Decree. *See Kersh Lake Drainage Dist.* v. *Johnson*, 309 U.S. at 491-492; *Kerrison* v. *Stewart*, 93 U.S. at 160; *Restatement of Judgments, supra* § 85 comment f.

The Tribe, moreover, is equally chargeable with the knowledge of the ongoing *Orr Ditch* proceedings. Nev. Brief at 12, 18-19; pp. 25-30 *infra*. Under the circumstances, the Tribe's failure to intervene reasonably would have led the *Orr Ditch* defendants to believe that the Tribe would accept the ultimate quantification of its water rights.

[31] The Amended Complaint did, however, allege that the Government was seeking to protect the Indians in their fishing. Nev. App. 6a. And, of course, all interested parties repeatedly discussed and

it successfully pressed for a *Winters* right for the Reservation. Accordingly, under the doctrine of res judicata, the entire Federal reserved water rights claim for the Pyramid Lake Reservation merged in the *Orr Ditch* Final Decree; that Decree extinguished any right to additional water for fishery purposes. *See id.* §§ 18, 24-25.

The Tribe maintains that it is unfair to apply these modern tests "retroactively" to its water rights claim. *See* Tribe's Brief at 24-25. This Court, however, normally applies current doctrine to the case before it—whether the case involves preclusion or other judicial principles.[32] The Tribe, moreover, has failed to point to any rule of procedure or substantive law in effect at the time of *Orr Ditch* that prevented the assertion in that case of a *Winters* claim for water for fishery purposes for the Reservation.[33] Because no substantive or procedural barrier existed to the assertion of that claim in *Orr Ditch*, it is entirely appropriate to apply a transactional approach in the present case.[34]

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argued about fishing and the fishery problem during the entire pendency of the *Orr Ditch* case. *E.g.*, JA 317, 318, 320, 321-324, 326-334, 335-337, 339-341, 342-343, 348-356, 357-358, 359-361, 387-388, 389, 390, 391, 393-394, 424-425, 426-429, 433-437, 443, 444, 450-451, 452-454, 459, 471-473, 474-475.

[32] *See, e.g., Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331-332 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 350 (1971); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. at 323. The cases on which the Tribe relies merely point out that legislation, unlike a court decision, usually has only prospective effect. *See generally* 1B *Moore's Federal Practice, supra* note 12, ¶ 0.402.

[33] *See* 1B *Moore's Federal Practice, supra* note 12, ¶ 0.410[1]; 1 *Restatement (Second) of Judgments, supra* §§ 24 comment a, 26(c) & comment c.

[34] The Tribe contends that even if its asserted claim arises from the same transaction, two specific exceptions to the rule against splitting a cause of action permit it to bring its fishery claim now. Trib 's Brief at 30.

First, a plaintiff can bring a second action against the same defendant based on the same claim when "[t]he judgment in the first

D. The "Same Evidence" Test Also Shows That This Cause of Action Is the Same as the Cause of Action in *Orr Ditch*.

The Tribe argues that if this Court were to define "cause of action" under the test allegedly prevailing at the time of the *Orr Ditch* litigation, this Court would conclude that the present case presents a cause of action different from the cause of action in *Orr Ditch*. *See* Tribe's Brief at 22-25. We have shown that the modern transactional approach properly governs this case. Even applying the older standard, however, the Court of Appeals correctly concluded that the Tribe's favored "same evidence" test still failed to demonstrate any distinction in the causes of action. *See* Nev. App. 224a-225a.

The *Restatement of Judgments* contains the classic formulation of the "same evidence" test:

> Where a judgment is rendered in favor of the plaintiff or where a judgment on the merits is rendered in favor of the defendant, the plaintiff is

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action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." 1 *Restatement (Second) of Judgments, supra* § 26(1)(d). *Orr Ditch*, of course, involved no such constitutional or statutory scheme. In any event, the all-inclusive nature of the *Orr Ditch* action, far from suggesting a basis for splitting a claim, required the assertion of all claims by all parties. The finality of the Decree, moreover, did not unfairly limit the Tribe's rights: based on irrigable lands, not just lands then irrigated, the quantification allowed for future needs. Nev. Brief at 18.

Second, a plaintiff can sue the same defendant again on the same cause of action if "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason * * *." 1 *Restatement (Second) of Judgments, supra* § 26(1)(f). The policies favoring finality and repose are nowhere stronger than in water rights adjudications. *See Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. at 819; *United States* v. *New Mexico*, 438 U.S. at 705. The Tribe has shown no exceptional reason that would suffice to topple the *Orr Ditch* Final Decree.

> precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action. [*Restatement of Judgments, supra* § 61.]

The Tribe maintains that because in the present case it would offer evidence of a fishery purpose for the Pyramid Lake Reservation and evidence of the amount of water needed to sustain the fishery, the present case presents a new cause of action. *See* Tribe's Brief at 22 & n.12. Even under the older "same evidence" test, however, a plaintiff's mere proffering of different evidence in a second case did not necessarily give rise to a new cause of action. Rather, as the *Restatement* indicates, courts had to judge the evidence offered in each case with reference to the substantive law involved. *See Restatement of Judgments, supra* § 61.[35]

Courts therefore had to consider whether the new evidence offered in the second case was material to a substantive right different from that asserted in the first

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[35] As one court explained,

> This concept [of a cause of action] regards as a unit a material set of facts which *under the rules of the substantive law*, individualize plaintiff's claim based on such facts so as to distinguish it from any other claim of the same plaintiff against the same defendant, resulting from the same wrongful act. [*Vasu* v. *Kohlers, Inc.*, 145 Ohio St. 321, 334-335, 61 N.E.2d 707, 715 (1945) (emphasis added).]

Based on this test, the Ohio Supreme Court in *Vasu* followed the minority rule that a single wrongful act gives rise to separate causes of action for personal injuries and property damage. *See* 145 Ohio St. at 334-336, 61 N.E.2d at 715-716. Not long thereafter, the court overruled *Vasu* and adopted the majority position, based on "modern practice," that those different injuries are only separate items of damage within a single cause of action. *Rush* v. *City of Maple Heights*, 167 Ohio St. 221, 235, 147 N.E. 2d 599, 607, *cert. denied*, 358 U.S. 814 (1958). This development of the law in Ohio illustrates the dubiousness of adhering to the "same evidence" test when no legal barrier existed to the assertion of all related claims in the original proceeding.

case.[36] Apparently recognizing this substantive aspect of the "same evidence" test, the Tribe attempts to show that its fishery evidence goes to an entirely separate and divisible "fishery water right." Tribe's Brief at 23. We already have shown the fallacy of this argument.

In asserting a Federal reserved water right for the Pyramid Lake Reservation in *Orr Ditch*, the United States had to set forth its entire claim. *See* note 26 *supra*. Nor did it purport to do otherwise.[37] The Government separately delineated its claim for the Reservation and contested with the defendants the "Indian purposes" for which it had established the Reservation. Nev. Brief at 4-6, 8-9, 11-12. Evidence of a primary fishery purpose "would have sustained" the *Winters* claim for a Federal reserved water right for the Reservation in *Orr Ditch*. *Restatement of Judgments*, *supra* § 61; *see Colville Confederated Tribes* v. *Walton*, 647 F.2d 42, 47-48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Accordingly, under the "same evidence" test, plaintiffs are precluded from maintaining the present action.[38]

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[36] *See, e.g., Troxell* v. *Delaware, L. & W. R.R. Co.*, 227 U.S. 434, 440-443 (1913); *The Haytian Republic*, 154 U.S. 118, 125 (1894); *Vasu* v. *Kohlers, Inc.*, 145 Ohio St. at 335-339, 61 N.E.2d at 711-716. *See generally* 2 A. Freeman, *A Treatise on the Law of Judgments* § 687 (5th ed. 1925).

Just as the Ohio Supreme Court has rejected *Vasu*, this Court since has questioned the soundness of the conclusion in *Troxell* that the cases there presented separate causes of action. *See Baltimore S.S. Co.* v. *Phillips*, 274 U.S. at 323.

[37] *Cf. Union Mill & Mining Co.* v. *Dangberg*, 81 F. 73, 87, (C.C.D. Nev. 1897) (suit sought only to enjoin respondents' interference with plaintiff's water right, not to determine amount of water parties entitled to divert); *Hudson* v. *West*, 47 Cal.2d 823, 831, 306 P.2d 807, 811 (1957) (en banc) (action between two landowners litigated right to take water only during irrigation season, not during rest of year).

[38] The Court of Appeals rejected the Tribe's argument that in water adjudications only claims actually litigated are barred from relitigation. Nev. App. 226a. The Tribe now recasts its argument without persuasion in the context of the same evidence test, citing

At best, plaintiffs' fishery evidence shows a different ground for assertion of a *Winters* water right for the Reservation from that presented in *Orr Ditch*. As the Court of Appeals recognized (*see* Nev. App. 224a-225a), this distinction does not establish a separate cause of action. A major treatise on judgments written during the course of the *Orr Ditch* proceeding made the point this way:

> [I]f the right to be maintained is identical, a mere difference in some of the evidence by which the right is to be established does not make a difference in the cause of action. This is apparent when we consider the essential distinction between the grounds of action and the cause of action. If a different ground of action is alleged in each case, different evidence is to that extent necessary in each, yet the cause of action may be the same in both actions and the judgment in one a bar to the other. [2 A. Freeman, *supra* note 36, § 687 at 1450 (footnotes omitted).]

Thus, it is too late for plaintiffs to assert this basis for a *Winters* water right.[39]

Kinney, *Irrigation and Water Rights* (2d ed. 1912), § 1563, and Weil, *Water Rights in the Western States* (3rd ed. 1911), § 1233. Tribe's Brief at 24. Kinney's statement in § 1563 correctly describes the effect of collateral estoppel, though referring to res judicata. Weil's comments were directed to a Colorado statutory adjudication, which is therefore distinguished from *Orr Ditch*. Close analysis of Weil's underlying authorities casts doubt upon the limited rule of res judicata described. Moreover, it was conclusively established shortly thereafter that the ordinary rules of res judicata apply under Colorado statutory adjudications. *Greeley and Loveland* v. *Handy Ditch Co.*, 77 Colo. 487, 240 P. 270 (1925). *Masterson* v. *Pacific Livestock Co.*, 144 Ore. 396, 24 P.2d 1046 (1933), also cited by the Tribe, was overruled by *Adams* v. *Perry*, 168 Ore. 132, 119 P.2d 581 (1941).

[39] *See* 2 A. Freeman, *supra* note 36, § 681; *Restatement of Judgments*, *supra* §§ 62 & comments d & e, 63 & comment a; 1 *Restatement (Second) of Judgments*, *supra* § 25 & comments c-d, f, j; note 26 *supra*.

Finally, even at the time of the *Orr Ditch* proceeding, the "same evidence" test was only "[o]ne of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit * * *." *The Haytian Republic*, 154 U.S. at 125. Other tests employed in that era reinforce the conclusion that this case presents the same cause of action as *Orr Ditch*.[40]

III. BARRING PLAINTIFFS FROM ASSERTING THE CLAIMED "FISHERY WATER RIGHT" DOES NOT DENY PROCEDURAL DUE PROCESS.

The Tribe maintains that even if the cause of action in the present case is identical to the cause of action in *Orr Ditch*, preventing the Tribe from now asserting its fishery water right claim denies it procedural due process. *See* Tribe's Brief at 20, 37-43. Even if this issue were properly before this Court,[41] the Tribe's claim has no

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[40] Under one such formula, the causes of action were considered identical if the same wrong infringed the same right in both actions. *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. at 321. Here, in both cases the same asserted wrong—the defendants' use of water claimed by the United States—interferes with the same right—the Federal reserved water right for the Pyramid Lake Reservation.

Another older test was whether the judgment in the second action would impair rights established in the first. *See Schuylkill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 308, 165 N.E. 456, 458 (1929) (Cardozo, C.J.). A judgment in favor of the plaintiffs in the present case would impair the water rights granted in *Orr Ditch* to the United States for the Newlands Project and to the defendants in that case, as well as the water rights subsequently obtained by others in reliance on the *Orr Ditch* Final Decree. See note 86 *infra*.

See generally Developments in the Law—Res Judicata, *supra* note 12, at 824-825; 1B *Moore's Federal Practice*, *supra* note 12, ¶ 0.410[1] at 1157-1158; 18 Wright & Miller, *supra* note 12, § 4407 at 58-60.

[41] Although the body of the Tribe's brief is peppered with references to an alleged denial of due process of law, the Question Presented makes no reference to due process, to the United States Constitution, or to any Article or Amendment thereof. The Tribe is therefore precluded from arguing a constitutional principle. Rule

merit. The Tribe was fully aware of the *Orr Ditch* proceedings and could have asserted a specific fishery claim. In any event, the United States effectively represented the Indians' interests in *Orr Ditch*.

Even if we were to assume that the United States did not meet its duty to the Indians, however, the innocent *Orr Ditch* defendants remain entitled to rely on the *Orr Ditch* adjudication. Nev. App. 191a.[42] Thus, the Indians constitutionally are bound by the *Orr Ditch* Final Decree.

A. The Indians Were Fully Aware of the *Orr Ditch* Case and Could Have Asserted a Fishery Claim There.

The Tribe maintains that res judicata cannot block its effort to assert its fishery claim because it lacked official notice of the *Orr Ditch* action and an opportunity to be heard in that case. Tribe's Brief at 37-43. The Tribe, however, was completely cognizant of *Orr Ditch* and itself could have asserted its fishery claim there. Because the Tribe had a proper legal representative in the United States, moreover, the fact that the Tribe itself did not receive legal notice or participate in the *Orr Ditch* proceeding provides no basis for finding a deprivation of due process.

As for what the Indians knew, on the record in this case it is obvious that they were fully aware of the *Orr Ditch* case and of the rights being litigated. It is also clear that the Indians' views were repeatedly being sent

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21.1(a) of the Rules of this Court. The Tribe presented essentially the same issues to the Ninth Circuit as it has to this Court. In the ISSUES PRESENTED FOR REVIEW to the Circuit Court, as here, the Tribe made no mention of a constitutional question. See Brief of Appellant Pyramid Lake Paiute Tribe of Indians, Ninth Circuit, p. 1. The record presents none of the exceptions to Rule 21.1(a) noted in Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 456-461, and the cases there cited.

[42] Moreover, there is no evidence whatever in this record that the TCID farmers had any knowledge that would have put them on notice of any Governmental failure. *See* note 70 *infra*.

to and heard by officials at every level of the Government and by private parties who had an interest in their problems. The case, after all, was not being conducted by one or two individuals in an obscure fashion. On the contrary, the record shows the involvement of officials and authorities high and low.[43] As a result of the participation of these officials, various people reported back and forth as to the Indians' feelings about the water they were receiving and the fishery.[44]

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[43] *E.g.*, the Secretary of Interior; the Acting Secretary of Interior; the Attorney General of the United States; an Assistant Attorney General of the United States; a Special Assistant to the Attorney General; the Commissioner, Office of Indian Affairs, Department of Interior; the Governor of Nevada; a United States Senator; the Mayor of Reno; the Superintendent of Irrigation of the U.S. Indian Service; the Special Supervisor of the Indian Agency; the Supervisor in Charge of the Indian Agency; a Special Agent of the Commissioner of Indian Affairs; the Acting Commissioner of the Office of Indian Affairs; the Special Supervising Engineer of the Bureau of Indian Affairs; the Supervising Engineer at Large of the Indian Service; the Superintendent of the Reno Indian Agency; the Superintendent of Field Service of the Office of Indian Affairs; the Acting Agent of the Pyramid Reservation; the Superintendent of the Walker River Indian Reservation; the Superintendent of the Pyramid Lake Agency and the Sanatorium; representatives of the Nevada Fish and Game Commission; representatives of the Nevada State Fish and Game Protective League; the Superintendent of State Hatchery; the County Game Warden; and the Superintendent of the Carson Indian School. JA *passim*.

[44] *E.g.*, JA 385-386, 387. The Superintendent of the Carson Indian School, Mr. Snyder, met with the Indians on a number of occasions and acted as a messenger between the Indians and Government officials. He recognized that "the turning of the water into Pyramid Lake is now a matter to be handled by the United States court." JA 424. After a four-hour conference with the Indians, he reported the Indians' protest to the Commissioner of Indian Affairs. JA 426. He asked the Indians to explain their objections (JA 427), had another conference with them (JA 428), and thereafter "sent a protest signed by 154 adult Indians of the Reservation" protesting the sale of certain lands for irrigation purposes. See JA 430. In a response to this protest, the Commissioner of Indian Affairs wrote Snyder a letter which specifically cited the

On July 26, 1934, the Pyramid Lake Indian Council wrote to the Commissioner of Indian Affairs discussing the Tribe's water rights and pointing out that "this matter has been tied up in the courts for some fifteen years, as we recall it" (JA 463), thus showing that the Tribe was, and had been, well aware of the *Orr Ditch* litigation. The Commissioner wrote the Tribal Council on September 24, 1934, stating:

> At the present time as you no doubt have been informed, steps are being taken looking to having the temporary order of the court entered in 1926 in the suit entitled United States of America v. Orr Water Ditch Company et al, made final by further action of the court. [JA 467.]

The Tribe's complaints regarding its water rights and the Tribe's knowledge of the *Orr Ditch* litigation are well documented.[45]

If there had been any doubt about the Indians' knowledge and their capacity to represent their own interests, it was dispelled in 1943, a year before the Final Decree, when the Tribal Chairman, the secretary of the Tribe, and the Commissioner of Indian Affairs appeared before the House Committee on Indian Affairs and specifically discussed the 1926 *Orr Ditch* Temporary Restraining Order (*see* Nev. App. 12a-16a) and the water rights decreed to the Tribe. Ex. U-543, pp. 23, 24, 26, 28, 80 (reprinted as Appendix B to this Brief). And in response to requests for admissions propounded by the State of Nevada in the instant case, the Tribe admitted in Responses 19-20, 31, 34, 37 and 40 that during the

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Orr Ditch Temporary Restraining Order (JA 431, 432) and referred to "the present feeling" of the Indians. He noted what they had said and what their views, fears, contentions, and desires were. JA 433-437. Snyder was admonished to "discuss the contents of this letter with the Indians and obtain their further views on the matter." JA 438. Snyder again wrote the Commissioner, setting forth the further views of the Indians. JA 452-454.

[45] *See, e.g.*, JA 455-457, 458-460, 461-462, 467-468, 471-473.

course of the *Orr Ditch* proceedings, one or more of the Indians belonging on the Pyramid Lake Reservation were aware of the existence of the *Orr Ditch* case and were also aware that the interests of the Tribe were involved. Ex. A-16.

In a Finding of Fact not disturbed by the Court of Appeals, the District Court determined that the Tribe had had the actual and legal ability and capacity to intervene in *Orr Ditch* from the time of the filing of the complaint up to and including the entry of the Final Decree for the purpose of asserting an alleged fishery water right. Nev. App. 186a.[46] The actual ability to intervene for purposes of asserting the right now claimed implies a knowledge of the case and the means to appear in its own right. Not only was the Tribe aware of *Orr Ditch*, but it had legal capacity to sue,[47] familiarity in dealing with counsel,[48] and procedural ability to intervene.[49] Also, the trial court finding that the Indians were aware of the decline of the fishery during the course of the litigation has never been challenged. Nev. App. 187a.

In short, the Tribe had actual knowledge of the *Orr Ditch* case, as well as knowledge that the Lake and the fishery were declining, knowledge of the claim that the Tribe was entitled to the earliest right on the River, and knowledge that the United States was representing its interests in water rights. Even though the Tribe had the actual and legal ability to intervene during the course

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[46] *See* JA 515, 518, 524-528; note 2 *supra*. The Tribe did successfully intervene in *Orr Ditch* on August 5, 1976. Nev. App. 186a; JA 9.

[47] Nev. App. 183a, 186a; *see* Nev. Brief at 46-47 & n.57.

[48] During the course of the *Orr Ditch* litigation, the Tribe contracted with its own independent counsel to deal with other legal matters. Ex. U-259, pp. 19-20, 22, 25; Tr. 8727-29.

[49] The procedural rules allowing for intervention at the time of *Orr Ditch* were in many respects the same as current practice. *See generally* 3B *Moore's Federal Practice*, *supra* note 12, ¶¶ 24.01[2], 24.04; 7A Wright & Miller, *supra* note 12, § 1903.

of the *Orr Ditch* proceedings, it did not choose to do so until the trial of this case was at an active stage. There was no denial of due process.

In the light of the facts recited above, the Indians' contention that they never received "legal notice" of the *Orr Ditch* case or "an opportunity to be heard" there hardly deserves comment. They were fully aware of the case at every stage and could have intervened. But even more to the point, no such legal notice or personal appearance was required. The Indians were privy to the case through their representative, the United States, and accepted its representation throughout. No case requires that the Government must serve process on a tribe it represents in court. *See Heckman* v. *United States, supra.*[50] Nor has it ever been contended, so far as we are aware, that the Indians themselves must be notified every time the court proposes to take action, much less that they must participate directly.[51] Such a requirement would be

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[50] The Tribe's citations to *Mullane* v. *Central Hanover Bank & Trust Co., supra,* and *Hansberry* v. *Lee, supra,* are inapposite. Tribe's Brief at 38-39; *see* note 27 *supra.*

[51] The Tribe places considerable reliance upon *Logan* v. *Zimmerman Brush Co.*, 50 U.S.L.W. 4247 (1982). *See* Tribe's Brief at 40-43. This reliance is misplaced. In *Logan*, the issue was whether the State could terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure. This Court simply held that a State may not finally destroy a property interest without first giving the putative owner an *opportunity* to present his claim of entitlement. 50 U.S.L.W. at 4250. The Court made clear that the opportunity for a hearing need only be " 'appropriate to the nature of the case.' " *Id.* at 4251. In the instant case, the Tribe not only had the opportunity to intervene in *Orr Ditch* and to assert its own claims, but, even more to the point, its claim to a full *Winters* right was presented on its behalf by the United States and litigated in *Orr Ditch*.

We similarly cannot understand the Tribe's reliance on *Lugar* v. *Edmondson Oil Co.*, 50 U.S.L.W. 4850 (1982). In that case, this Court merely held that in a suit on a debt involving a pre-judgment attachment of property, the property owner sufficiently alleged State

tantamount to holding that the Government's representation is per se unconstitutional.[52]

B. The United States Adequately Represented the Indians in *Orr Ditch*.

It is axiomatic that proper representation by a party of a nonparty's interest in an action ties the nonparty to the judgment and affords the nonparty due process.[53] It bears repeating that in this case, the District Court ruled as a matter of both fact and law that the United States properly had represented the interests of both the Newlands Project and the Indians in *Orr Ditch* and that the Indians had not been denied due process. Nev. App. 189a-190a, 192a. The Court of Appeals did not reverse these rulings, but merely assumed for purposes of analysis that the Government's representation of the Indians in *Orr Ditch* had been improper and inadequate. Nev. App. 237a-238a. No legal or factual basis for finding inadequate representation exists in this case.

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action by challenging the unconstitutionality of the underlying State statute.

[52] The Tribe similarly complains because the District Court failed to inquire about the Government's representation and its apparent conflict of interest. However, it is now clear that the Government acted properly and that there was nothing to inquire about. Moreover, neither this Court nor any other court, to our knowledge, has ever held that when the Government represents its Indian wards, the trial court must conduct an inquiry into whether there are competing interests within the Governmental rubric. Such a requirement, absent a prior showing of impropriety by one of the parties, would be an improper intrusion into the internal workings of the Executive Branch, for "impugning the integrity of a coordinate branch of government is to be avoided if possible." L. Tribe, *American Constitutional Law* § 12-5, at 593 n.9 (1978); *see Village of Arlington Hts.* v. *Metropolitan Housing Development Auth.*, 429 U.S. 252, 268 n.18 (1977); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 131 (1810).

[53] *See, e.g., Hansberry* v. *Lee*, 311 U.S. at 42-43; 1 *Restatement (Second) of Judgments*, *supra* at 6-7, § 41. *See generally* 18 Wright & Miller, *supra* note 12, § 4454.

As the Court of Appeals recognized (*see* Nev. App. 230a n.13, *as modified*, 257a), the degree to which a court will examine the adequacy of a party's representation of a nonparty should depend on the nature of the relationship involved. The Tribe apparently would subject the Government's representation of its interests in *Orr Ditch* to the close attention accorded a representative in class action litigation. *See* Tribe's Brief at 39 (citing *Hansberry* v. *Lee*, *supra*). In such cases, because of the "voluntary and non-contractual" nature of the representation (1 *Restatement (Second) of Judgments*, *supra* § 41 comment e), a court carefully will examine the identity of interests between the putative class representative and the class members. *See, e.g.*, *Hansberry* v. *Lee*, 311 U.S. at 44-46. If the interests were divergent, the judgment does not bind class members whose interests did not coincide with those of the representative. *See id.*; 1 *Restatement (Second) of Judgments*, *supra* § 42(1)(d) & comment e. The fleeting nature of the responsibility also subjects the subsequent conduct of the litigation by a properly constituted representative to "particular scrutiny." *Id.* § 42 comment f.[54]

The Court of Appeals correctly pointed out, however, that the United States was not merely a temporary standard-bearer for the "class" of Paiute Indians in *Orr Ditch*. Nev. App. 257a. Rather, because the Indian tribes are "domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian" (*Cherokee Nation* v. *Georgia*, 30 U.S. at 17), the United States is invested with "complete" authority to represent the Indians in court. *Heckman* v. *United States*, 224 U.S. at 444. Although the capacity of the United States to

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[54] The *Restatement (Second)* also applies this standard to preclusive Governmental representation of citizens and taxpayers, who have the same distant relationship to the Government as class members have to their representative. *See* 1 *Restatement (Second) of Judgments*, *supra* § 42 comment f; Nev. App. 257a. *See generally* 18 Wright & Miller, *supra* note 12, § 4455.

represent the Indians is unquestionable, this "peculiar" relationship (*id.* at 442) does not fit neatly into any of the categories of trusteeship, agency, guardianship,[55] or Governmental representation identified in the *Restatement*. *See* 1 *Restatement (Second) of Judgments*, *supra* § 41(1)(a)-(d).

However the relationship between the United States and the Indian tribes may be characterized, this Court never has questioned the propriety of the Government's representation of multiple interests, including Indian interests, in water rights adjudications[56] or other types

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[55] This Court frequently has drawn an analogy between the relationship of the United States to the Indian tribes and a guardianship. The Court thus has described the capacity in which the United States represents the Indians (*e.g.*, *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. at 444; *cf. Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 657 & n.1 (United States sued as "trustee" of Indian lands)), and has characterized the relationship in other settings. *See generally* F. Cohen, *supra* note 17, at 40-43, 169-173.

As the Tribe recognizes, however (*see* Tribe's Brief at 21 & n.9), this relationship is not a typical fiduciary relationship. The right of the United States to sue on behalf of the Indians, for example, does not preclude a Tribe or individual Indian from bringing an independent action. *E.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. at 370-371; *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113-114 (1919); *cf.* G. Bogert, *The Law of Trusts and Trustees* § 869 (rev. 2d ed. 1982) (right to sue for wrong to trust property normally vests in trustee, not beneficiary). Furthermore, although a suit by the United States on behalf of the Indians will bind them (*Heckman* v. *United States*, 224 U.S. at 445-446), a suit by the Indians will not bind the United States unless it becomes a party. *Poafpybitty* v. *United States*, 390 U.S. at 371 & n.9.

The guardianship of the United States over the Indians, moreover, has led the courts often to defer to the judgment of the Government in dealing with the Indians. *See* p. 37 *infra*; *see also Morton* v. *Mancari*, 417 U.S. 535, 553-554 (1974) (rational basis test applies to preferential hiring of Indians in Bureau of Indian Affairs). *See generally* F. Cohen, *supra* note 17, at 170-171.

[56] *See* Nev. Brief at 45-46.

of litigation.[57] In a related vein, when a State participates in a water rights adjudication in its capacity as parens patriae, the State conclusively represents all of her citizens—although their claims may conflict directly with those of the named claimants and with each other.[58]

The law governing intervention reinforces the conclusion that representation of multiple interests by the Government, as such, provides no basis for a finding of inadequate representation or a denial of due process. The current Federal rule gives any person a right to intervene in a lawsuit if he has an interest that the proceeding may affect, "unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). This Court has construed this rule as generally requiring the would-be intervenor to make only a "minimal" showing that the "representation of his interest 'may be' inadequate * * *." *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).[59] Under this flexible standard, the Court has concluded for purposes of intervention that the Government's representation of multiple interests may raise "sufficient doubt about the adequacy of representation" to warrant that intervention. *Id.* at 538.[60] Far from suggesting that Government

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[57] *See, e.g., Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 86 (1918) (United States sued to enjoin use by corporate fishery of fishtrap off Alaskan islands on grounds that trap lay within Indian reservation and obstructed navigable waters of United States).

[58] *E.g., New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953) (per curiam); *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932); *Badgley* v. *City of New York*, 606 F.2d 358, 363-365 (2d Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *see Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 102 S. Ct. 3260, 3265-3269 (1982).

[59] *See generally* 3B *Moore's Federal Practice*, *supra* note 12, ¶¶ 24.07-24.08; 7A Wright & Miller, *supra* note 12, §§ 1908-1909.

[60] In *Trbovich*, after the Secretary of Labor had sued to set aside a union election, a union member sought to intervene in the proceeding. 404 U.S. at 529-530. Reversing the lower courts' denial of the motion, this Court concluded that the statute authorizing the Secretary to bring such actions gave him "the duty to serve two

representation of multiple interests should invalidate a judgment, the Court's conclusion indicates that such representation merely provides a possible basis for intervention and is otherwise generally not only proper procedure, but a matter of course.

Even if one subjects the facts of this case to the close examination accorded the conduct of litigation by class representatives, one must conclude that, notwithstanding its simultaneous representation of the Newlands Project,[61] the United States did in fact vigorously pursue the claims of the Tribe in *Orr Ditch*. Contrary to the Tribe's argument (*see* Tribe's Brief at 40) and in accordance with the District Court finding (Nev. App. 189a-190a), the decision of the United States not to press for water specifically for a fishery does not prove a violation of due process. As the *Restatement* cautions,

> [t]he failure of a representative to invoke all possible legal theories or to develop all possible resources of proof does not make his representation legally ineffective, any more than such circumstances overcome

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distinct interests, which are related, but not identical." *Id.* at 538. The Secretary not only was authorized to enforce the union members' rights against the union, but also had a duty to protect the public interest in open and honest union elections. *Id.* at 538-539. The Court concluded that "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected," his dual responsibilities provided a sufficient basis for the union member to exercise his right to intervene. *Id.* at 539.

Similarly, in representing an Indian tribe, the United States typically litigates in a dual capacity. Even when the Government is not simultaneously asserting proprietary or other Federal interests, it is seeking to vindicate not only the rights of its Indian dependents, but also its own sovereign interest in fulfilling its obligations to them. *See United States* v. *Minnesota*, 270 U.S. at 194; *Heckman* v. *United States*, 224 U.S. at 437-444. If representation of such multiple interests provided a per se basis not only for intervention, but also for invalidating a judgment, no judgment conclusive on the United States would bind the Indians whom it had represented.

[61] After 1926, of course, TCID had its own independent counsel. *See* Nev. Brief at 15; JA 519-521.

> the binding effect of a judgment on a party himself. * * * [W]hether the representation has been inadequate is a question of fact to be decided in light of the issues presented in the case and the factual and legal contentions that might reasonably have been expected to be presented. [1 *Restatement (Second) of Judgments, supra* § 42 comment f.]

Shortly before the commencement of the *Orr Ditch* proceeding, this Court had established a doctrine of reserved water rights for irrigation of Indian reservations created by treaty. *See Winters* v. *United States*, 207 U.S. at 575-577. Considerable doubt existed, however, about the availability of any such right for an Executive Order reservation like Pyramid Lake. *See* Nev. Brief at 6-7, 16 & n.18. Courts then were only beginning to consider whether the *Winters* doctrine applied to such reservations at all, much less whether any purpose other than irrigation might support the declaration of a *Winters* right.[62] Although the Government successfully had prosecuted white fishermen for returning to the Pyramid Lake Reservation after having been removed,[63] this Court was protecting fishery rights for Indian tribes only where established by treaty [64] and had implied no such reserved rights under the *Winters* doctrine.

In this uncertain legal climate, it is hardly surprising that the United States would forgo asking for a discrete fishery water right in favor of pressing for the largest possible quantity of water for irrigation of the Reservation. *See* Nev. Brief at 6, 10, 12-14, 17-18. This is particularly true where, as pointed out above, the primary

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[62] *See United States* v. *Walker River Irrigation Dist.*, 11 F. Supp. 158, 163 (D. Nev. 1935), *rev'd*, 104 F.2d 334, 335-336 (9th Cir. 1939).

[63] *See United States* v. *Sturgeon*, 27 F. Cas. 1357, 1357-1358 (D. Nev.) (No. 16,413), *aff'd*, 27 F. Cas. 1358 (9th Cir. 1879).

[64] *See, e.g., Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-199 (1919); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. at 89-90; *United States* v. *Winans*, 198 U.S. 371, 381-382 (1905).

purpose of the Reservation as well as governmental policy was to establish the Indians as farmers, diverting them from dependency on hunting and fishing. Nev. App. 183a; JA 515-516. To have sought water for a fishery in the face of stiff opposition and uncertainty concerning the irrigation claims would have jeopardized the primary purpose of establishing the Reservation and subverted the entire United States policy toward the Indians at that time. JA 436-437.

The record reflects, moreover, that the interests of the Indians were paramount in the minds of Government officials at every stage of the *Orr Ditch* proceedings. The Government did not seek one general Federal water right in the Truckee River, which it could allocate among Federal claimants, but separately asserted and won water rights for the Project and the Tribe. Nev. Brief at 4-6, 8-9, 12-13. Contemporaneous letters, memoranda, and court filings reflect a continued concern about the welfare of the Indians as well as sensitive recognition of the need to avoid a conflict of interest. *E.g.*, JA 281, 313, 316, 334, 339, 345, 347, 357-358, 361, 363, 387, 419, 441, 468, 485-487. The very fact that the Government, strenuously opposed by the competing interests of the Newlands Project, was able to obtain more water for the Indians in the Truckee River Agreement and in the Final Decree is a clear indication that the Government was safeguarding the Indians' interests.

An expert historian who reviewed every document in the file of the *Orr Ditch* case concluded that the Government representation was proper in every respect and that there had been no improper conflict of interest. *E.g.*, JA 517, 518, 521-522, 530. He pointed out that the *Walker River* case, where there were no other interests involved, showed that the Government's espousal of Indian rights was not tainted by any alleged conflict. JA 518-519, 521.[65] He also pointed out that in the 1930's

[65] The contemporanous *Walker River* case, *United States* v. *Walker River Irrigation Dist.*, *supra* note 62, involved a claim for *Winters*

TCID had its own attorneys, so that long before the Final Decree the Government had no rights to look after except those of the Indians. JA 519.

Although it thus is apparent that no abstract or actual conflict of interest impaired the United States' representation of the Tribe in *Orr Ditch*, we reiterate that the Court need not go this far and subject the United States' representation to close analysis. The power to manage the property and affairs of Indians has been so extensive as to overcome the provisions of a treaty. *Shoshone Tribe* v. *United States*, 229 U.S. 476, 497 (1937) (Justice Cardozo for a unanimous Court).[66] It is only when there is a violation of Indian rights rising to a constitutional level, such as a taking without just compensation,[67] that this Court has looked behind the representation by the United States. The instant case is not even one in which the United States previously made a plain error of fact and now wishes to correct it under the authority of an existing decree, as the United States claims is the situation in *Arizona* v. *California*, Original No. 8, now before the Court.[68] Without in any way conceding that the United

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rights on the Walker Lake Indian Reservation, based upon the same series of letters and order in 1859 and the Executive Order of President Grant issued in 1874 as are involved in the instant case. In *Walker River*, there could have been no conflict of interest because the United States represented only the interest of the Indian Reservation; no reclamation project or other interest was asserted. Nevertheless, the Government did not assert a fishery water right in that case, even though, had the Government believed such a claim had merit, there was no alleged conflict of interest to prevent the assertion of such a claim. The Tribe nowhere mentions the *Walker River* case in its brief.

[66] *See also Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-567 (1903), and cases there cited.

[67] *United States* v. *Sioux Nation*, 448 U.S. 371, 407-417 (1980); *Shoshone Tribe* v. *United States*, 299 U.S. at 496-498; *United States* v. *Creek Nation*, 295 U.S. 103, 109-111 (1935).

[68] Reply Brief for the United States in *Arizona* v. *California* at 9, 18, 20.

States should be allowed to reopen the decree in that case under the circumstances there applicable, we merely point out that the situation there is wholly different from this one, since here a full *Winters* right for all purposes was considered, sought, litigated, and granted in the *Orr Ditch* case.[69]

C. Both Courts Below Correctly Held That the *Orr Ditch* Defendants Are Entitled to Rely on the *Orr Ditch* Decree.

Even if we were to assume that the United States did not adequately represent the interests of the Tribe in *Orr Ditch*, that failure does not provide a basis for reopening the *Orr Ditch* adjudication. First, that remedy is an inappropriate sanction for inadequate representation by a general, nonclass representative. Alternatively, as the courts below ruled, the *Orr Ditch* defendants were unaware of the Government's supposed impropriety and therefore were entitled to rely on the *Orr Ditch* Final Decree. Nev. App. 191a, 238a, *as modified*, 258a.[70] As the Court of Appeals added, enforcing the Final Decree therefore does not contravene the Tribe's due process rights. Nev. App. 258a.

This Court long ago established the rule that a nonparty can avoid a judgment binding on his general representative—whether a public or private trustee—only if the representative defrauded him or colluded with the opposing party.[71] The basis for this rule remains valid

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[69] The *Orr Ditch* Final Decree did not contain a reopening proviso, as the decree in the *Arizona* case did.

[70] The same is true as to the TCID farmers. *See* note 42 *supra*.

[71] *See Kersh Lake Drainage Dist.* v. *Johnson*, 309 U.S. at 491-492; *Manson* v. *Duncanson*, 166 U.S. 533, 542-543 (1897); *Kent* v. *Lake Superior Ship Canal, Ry. & Iron Co.*, 144 U.S. 75, 90 (1892); *Beals* v. *Illinois, M. & T. R.R. Co.*, 133 U.S. 290, 295 (1890); *Vetterlein* v. *Barnes*, 124 U.S. 169, 172 (1888); *Richter* v. *Jerome*, 125 U.S. 233, 246 (1887); *Kerrison* v. *Stewart*, 93 U.S. at 160; *Restatement of Judgments*, *supra* § 85 comment f.

today, at least for such nonclass representatives.[72] Courts continue to refuse to permit a nonparty dissatisfied with the result obtained by his or her representative to mount a collateral attack on the judgment.[73]

Thus, the cases cited by the Ninth Circuit (Nev. App. 236a) hold without exception that a judgment entered in an action brought by the United States on its own behalf and on behalf of Indian wards is binding upon the United States and the Indians whom it represents in that litigation.[74] The only exceptions to this rule noted by the Ninth Circuit were instances of fraud or collusion. *See* Nev. App. 236a n.18. But no fraud or collusion has been alleged by the Complaint or by the Indians in their brief, much less conceded by the United States. Not only is there no evidence of fraud or collusion, but there was a specific finding, left standing on appeal, that the Government's representation of the Indians in *Orr Ditch* was

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[72] Professors Wright and Miller defend the rule:

> As to representatives appointed for more general purposes, * * * it is reasonable to argue that preclusion should not be defeated by inept litigation. It is always difficult to require the opposing party to protest that his representative adversary should be presenting a more effective case. Little reason appears for imposing this price on an effective judgment. Instead, litigation by such general representatives should bind anyone claiming through the trust or estate. If a price must be paid for inept representation, it is better that at least in this situation it should be paid by personal liability of the representative rather than by denying preclusion to his adversary. [18 Wright & Miller, *supra* note 12, § 4454 at 471.]

[73] The Second Circuit recently adhered to this view in a water rights dispute. *See Badgley* v. *City of New York*, 606 F.2d at 369-370. *See also Sangiovanni Hernandez* v. *Dominicana de Aviacion, C. por A.*, 556 F.2d 611, 616 (1st Cir. 1977).

[74] In one of these cases, for example, the United States declined to appeal a decision adverse to a tribe, and the tribe attempted to appeal in its own right. The court refused to allow the appeal, holding that the United States, as guardian, had the power to control the litigation. *Pueblo of Picuris* v. *Abeyta*, 50 F.2d 12 (10th Cir. 1931).

entirely proper and ethical. Nev. App. 192a; *see also* Nev. App. 164a-165a, 189a-190a. Thus, the result of the ruling sought by the Tribe would be that the naked assertion of a conflict of interest by reason of Governmental representation of both Indians and farmers on a federal reclamation project would be enough to vitiate an entire judicial decree and allow the readjudication of rights that had been "finally" settled for almost 40 years.

The *Restatement (Second) of Judgments*, on which the Court of Appeals relied, broadens the grounds for avoidance of a judgment beyond instances of fraud or collusion. Although framed in terms of general applicability, the *Restatement* rule is based more on class action than fiduciary principles. 18 Wright & Miller, *supra* note 12, § 4454 at 470. The rule allows a nonparty to avoid a judgment against his representative if, among other reasons, "[t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, *and* the opposing party was on notice of facts making that failure apparent." 1 *Restatement (Second) of Judgments*, *supra* § 42(1)(e) (emphasis added). As the *Restatement* explains, elementary fairness dictates the latter requirement: "the party opposing the representative is entitled to assume that that representative participates in a way that will bind those whom he represents unless the circumstances warn the opposing party that there is doubt about the matter." *Id.* comment a. When the representation is "so grossly deficient as to be apparent to the opposing party, it * * * creates no justifiable reliance interest in the adjudication on the part of the opposing party." *Id.* comment f.

In the present case the District Court expressly found that the *Orr Ditch* defendants had no tainting knowledge of any Governmental impropriety:

> [I]f any impermissible conflict of interest existed (specifically found not to exist) with respect to the federal government lawyers in *Orr Ditch*, it was wholly internal to the government and was unknown

> to the defendants in *Orr Ditch* and they and their successors in interest herein are not chargeable with that knowledge and that conflict. [Nev. App. 191a.]

The Court of Appeals upheld this finding and, accordingly, ruled that the *Orr Ditch* defendants could invoke the *Orr Ditch* Decree to bar the present action. Nev. App. 238a, *as modified*, 258a. Thus, if we assume that the *Restatement (Second)* provides the correct rule of law, this conclusion, based on the concurrent factual finding of the lower courts, should be affirmed.[75]

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[75] The Court of Appeals also expressly noted that the plaintiffs had failed to challenge this finding on appeal. Nev. App. 238a. The Tribe states that it later raised the issue in its Petition for Rehearing. Cross-Petitioner's Reply Brief at 7 n.6. Raising this factual issue at this late stage did not preserve it for review in this Court. *Compare Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932), *with Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). And, again, a reversal would overturn the concurrent findings of the two courts below.

Contrary to the Tribe's contention (*see* Tribe's Brief at 33-34 & n.20, 42 n.25), no factual error—glaring or otherwise—exists in the lower courts' findings. As we have seen, at the time of the *Orr Ditch* proceeding, it was unclear whether any *Winters* right was available for an Executive Order reservation—much less for a purpose other than irrigation. The United States as representative of the Tribe in *Orr Ditch*, while forgoing any particular claim to water for a fishery, actively sought the largest possible water right for the Reservation. In this setting, the mere appearance of the United States as representative of both the Tribe and the Newlands Project farmers, even coupled with the general knowledge of the decline of the fishery, hardly could have constituted "notice" to the *Orr Ditch* defendants of "facts making * * * apparent" any failure of the United States adequately to represent the Tribe's interests. 1 *Restatement (Second) of Judgments*, *supra* § 42(1)(a). To the contrary, the United States' representation of the Indians' interests must have seemed vigorous.

The Tribe contends, moreover, that the Court of Appeals erred as a matter of law in rejecting its due process attack on the ground that the *Orr Ditch* defendants did not know of the Government's presumed conflict. *See* Tribe's Brief at 42 n.25. Without conceding that the *Restatement (Second)* provides the proper rule of law, we do point out that the *Restatement* sections concerning representa-

IV. BOTH COURTS BELOW CORRECTLY HELD THAT SUBSEQUENT APPROPRIATORS MAY INVOKE THE *ORR DITCH* DECREE.

The *Orr Ditch* Final Decree, entered in 1944, did not parcel out all of the waters of the Truckee River. Since that time many persons have acquired rights to use the unclaimed river water in accordance with Nevada law and in reliance on the permanence of the Decree.[76] Like the *Orr Ditch* defendants, these "subsequent appropria-

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tive litigation were drafted with due process considerations in mind. *See* 1 *Restatement (Second) of Judgments, supra* at 6-7, § 42 Reporter's Note.

The Tribe claims that, in any event, "[d]etermining the adequacy of representation of nonparties' interests by public agencies or officials is governed by Section 42[(1)](d) of the *Restatement (Second)*, not Section 42[(1)](e)." Tribe's Brief at 42 n.25. Section 42(1)(d), however, goes only to the initial alignment of interests between a class representative and the class or a subgroup; if there is "a substantial divergence," the judgment will not be binding. 1 *Restatement (Second) of Judgments, supra* § 42(1)(d). As the Court of Appeals recognized, this provision is inapplicable to the well-established relationship between the United States and the Indian tribes. Nev. App. 257a. As we have seen, moreover, simultaneous representation of Indian and other interests by the Government has been commonplace and unquestioned.

In contrast to Section 42(1)(d), Section 42(1)(e) is intended to govern the actual conduct of litigation by all representatives. We have seen that even if the adequacy of official representation in the circumstances of this case is subject to the same "particular scrutiny" as class representation (1 *Restatement (Second) of Judgments, supra* § 42 comment f), the Government's representation of the Tribe was wholly sufficient. Even if we were to assume that it was not, moreover, under the rule of the *Restatement (Second)*, a nonparty inadequately represented by the Government—just like a nonparty represented by a derelict private trustee—can obtain relief from the judgment only if the opposing party was aware of that failure. *See id.* § 42 comments a, f. This rule protects the legitimate reliance interests of innocent third parties. *See id.*

[76] Indeed, the *Orr Ditch* Final Decree provides the foundation for the entire civilization of western Nevada. *See* Nev. Brief at 19-20; pp. 45-48 *infra*.

tors" are defendants in the present case. The Tribe maintains that they cannot take advantage of either res judicata or collateral estoppel to block the present action. *See* Tribe's Brief at 43. To the contrary, both courts below correctly ruled that like the *Orr Ditch* defendants, subsequent appropriators may invoke the *Orr Ditch* Final Decree as a defense to this action. *See* Nev. App. 188a, 191a-192a, 239a-240a, *as modified*, 258a.

In general, only the parties to the first lawsuit and their privies may assert res judicata to halt a second action. Although the post-1944 appropriators were not, of course, parties to *Orr Ditch*, the District Court found that they were "in privity" with the *Orr Ditch* defendants. Nev. App. 188a. The court's conclusion is sound.

In limited circumstances courts have recognized that a stranger to a first action may be entitled to the benefit of claim preclusion as a defense in a second proceeding. New defendants have been permitted to maintain both that an earlier judgment in favor of the original defendants barred the second action (*see, e.g., Fowler* v. *Wolff*, 479 F.2d 338, 339-340 (8th Cir. 1973) (per curiam); *Gambocz* v. *Yelencsics*, 468 F.2d 837, 840-842 (3d Cir. 1972)), and that the claims of the plaintiff in the second action had merged in an earlier final judgment in the plaintiff's favor. *See Cambist Films, Inc.* v. *Duggan*, 475 F.2d 887, 890-891 (3d Cir. 1973). Whether technically merger or bar, the basic principle is the same: when "a plaintiff * * * has previously asserted essentially the same claim against different defendants" and "there is a close or significant relationship between successive defendants," the new defendants in the second action successfully may raise the res judicata defense. *Gambocz* v. *Yelencsics*, 468 F.2d at 841. *See generally* 18 Wright & Miller, *supra* note 12, § 4464 at 586-589.[77]

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[77] *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955), is not to the contrary. There this Court held that an antitrust conspiracy that had continued after an earlier judgment presented a new cause of action. *See id.* at 326-329. The Court went on in

This equitable extension of the usual scope of claim preclusion protects the post-1944 appropriators in the present case. As the Court of Appeals recognized (Nev. App. 239a-240a, *as modified*, 258a),[78] because the United States previously adjudicated its water rights claims, and the water rights of the *Orr Ditch* defendants and the subsequent appropriators are closely intertwined, it would be inconsistent and unfair to give the benefit of the finality of the *Orr Ditch* Final Decree to the *Orr Ditch* defendants and to deny it to the subsequent appropriators who find themselves defendants now. In addition, to allow the United States and the Tribe to proceed against subsequent appropriators "would make it impossible ever finally to quantify a reserved water right." Nev. App. 240a. Then, even after a court had declared the water rights of the original parties, as the court did in *Orr Ditch*, the United States and other parties always could come back—as the plaintiffs are trying to do now—seeking to increase their

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dictum to suggest that in any event, five defendants who had not been parties to the first antitrust suit could not invoke res judicata. *See id* at 329-330. Unlike the subsequent appropriators in the present case, the new defendants in *Lawlor* faced an entirely new cause of action. Those defendants, moreover, had no reliance interest in the previous judgment.

This Court's recent decision in *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), indicates that even if valid as a general rule, the *Lawlor* dictum should have limits. In *Moitie*, several plaintiffs in parallel antitrust suits had failed to appeal judgments against them. *Id.* at 395-396. Others had mounted successful challenges overturning the legal basis for the earlier adverse decisions. *Id.* at 396-397. This Court held that the nonappealing plaintiffs could not relitigate their claims, although "'closely interwoven' with that of the successfully appealing parties." *Id.* at 399, quoting *Moitie* v. *Federated Dep't Stores, Inc.*, 611 F.2d 1267, 1269 (9th Cir. 1980). In rejecting that exception to the principles of claim preclusion, this Court emphasized the value of repose and the importance of strict adherence to the finality of judgments. *See* 452 U.S. at 399-402. These very considerations argue in favor of extending the benefits of res judicata to the subsequent appropriators in this case.

[78] *See also* 6 *Waters and Water Rights*, *supra* note 22, § 532.2.

water rights at the expense of those who began to use water only after and in reliance on the initial decree. To give the original parties such a second try would undermine the entire purpose of comprehensive water rights adjudications such as *Orr Ditch*.

The two courts below properly allowed the post-1944 appropriators to assert the res judicata defense to the present action. They thus protected the integrity of the *Orr Ditch* adjudication and provided even-handed treatment to the closely related interests of the defendants in this case.[79]

V. THERE HAS BEEN DETRIMENTAL RELIANCE BY ALL WATER USERS ON THE *ORR DITCH* DECREE.

The District Court found that not only the parties and their successors but other persons, firms, corporations, entities, agriculture, business, industry and labor have detrimentally relied upon the terms and conditions of the *Orr Ditch* Final Decree.[80] As a matter of fact, the court found that billions of dollars had been spent and were in the process of being spent, for vital municipal and industrial facilities on the basis of the Final Decree.[81] Thus,

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[79] Even if we were to assume that subsequent appropriators cannot invoke res judicata, they can raise the defense of collateral estoppel. As we have seen, the issues in this case were actually litigated in *Orr Ditch*. Plaintiffs, moreover, had a full and fair opportunity and every incentive to litigate their reserved water rights claims in that earlier case. Accordingly, the subsequent appropriators, although nonparties in *Orr Ditch*, may preclude plaintiffs from reopening those issues in the present case. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. at 320-330, 349-350. *See also* note 13 *supra*.

[80] Nev. App. 189a. There was overwhelming evidence in the record to support this finding, including Exs. A-70427, A-70428, A-70429 and A-70430.

[81] JA 258-259. Again, the supporting evidence was overwhelming. *E.g.*, Tr. 5041; *see also* Exs. A-70002, A-70003, A-70009. The State of Nevada had spent $62,000,000 for the construction of

virtually the entire civilization of western Nevada, including all of its people and its economy, has grown and developed in reliance on *Orr Ditch*. The lives and properties of thousands upon thousands of people, rightfully relying on the Final Decree, will be devastated if it is not upheld. *See* note 86 *infra*.

The presence of detrimental reliance is an important basis for upholding a prior ruling.[82] Thus, for example, *United States* v. *Maine*, 423 U.S. 1 (1975), sustained a prior judgment on the basis that almost 30 years had elapsed since the first of the prior cases had dealt with the same subject matter. During that time, a great deal of private and public business had been transacted in accordance with the prior decisions and legislation enacted by Congress. In *United States* v. *Beebe*, 127 U.S. 338 (1888), this Court upheld the validity of a prior land patent issued by the United States (even though its issuance might have been erroneous), because of the occupation of the subject land by hundreds of innocent

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State buildings in reliance on the Final Decree. Exs. A-70101; Tr. 5072-77; *see also* Tr. 5099-5106. The State Engineer of Nevada had received many and frequent inquiries pertaining to the Final Decree in respect to sales and purchases of water rights and property with appurtenant rights. *E.g.*, Tr. 3990-94; Ex. A-70502. Pursuant to Nevada law, the State Engineer is required to approve water availability for new subdivisions, before residents may move in, and such approval is based upon the *Orr Ditch* Final Decree. Tr. 4057-63.

[82] The instant case reflects an apparent change in policy on the part of the United States. In *Orr Ditch*, the Government's entire emphasis was upon moving the Indians into agriculture by means of irrigation; the emphasis now appears to have shifted to fishery. But as the court very aptly pointed out in *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894, 907 (D. Colo. 1977), where Government policy in regard to oil shale plans had shifted, "[w]hile the courts cannot prevent the Government from having an unstable energy policy, the courts must prevent the Government from altering legal standards that have been relied upon by investors for the past half-century."

purchasers for more than a generation, all relying upon the faith of a patent issued by the United States.[83]

In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), a prior seizing of Indian property was upheld, even though such seizing may have been mistaken, because the land had been open to settlement and possession by innumerable innocent purchasers. The same result was reached in *United States* v. *Creek Nation*, 295 U.S. 103 (1935).[84] "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co.* v. *National Co.*, 70 U.S. (3 Wall.) 332, 334 (1865).[85]

The fishery right now claimed, after all, is not for a small amount of water to assist the fish in passing barriers in the river during spawning. Compare Nev. Brief at 13 & n.15 with Nev. App. 152a-153a, JA 10-11. The massive claim for water to maintain the level of a desert lake that has been shrinking since prehistoric times would

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[83] The lower courts have held that equitable relief will not be granted as against innocent third persons who, in good faith, have acted on the basis of a judgment which is later challenged. *E.g.*, *Bradburn* v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947); *see also Clay* v. *Sun River Mining Co.*, 302 F.2d 599 (10th Cir. 1962).

[84] *See also Skokomish Indian Tribe* v. *France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964); *Confederated Salish & Kootenai Tribes* v. *United States*, 401 F.2d 785 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969).

[85] To the same effect, see *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *see also Flood* v. *Kuhn*, 407 U.S. 258 (1972).

Reliance is rejected, of course, where no final court decree was ever entered. *Winters* v. *United States*, *supra*; *United States* v. *Walker River Irr. Dist.*, *supra*. But here we are dealing not only with a decree that is final but with one that has been in place for almost 40 years.

have no doubt surprised even the most ardent advocates of a fishery water claim during *Orr Ditch*. *See* Nev. App. 183a.[86]

VI. ADDITIONAL WATER IS NOT ESSENTIAL TO TO THE INDIANS' NEEDS.

Like the Tribe, Nevada has an interest in the quality of Pyramid Lake and its fishery. Indeed, Nevada's efforts beginning in the 1940's led to its restoration. Nev. App. 184a. Pyramid Lake has again (based on honoring present water rights) become the fourth most popular fishery in Nevada. Tr. 5917-18.[87] The record contradicts the Tribe's claim that the survival of the Lake, the fishery and the Tribe depend on the imposition of a senior water right for the fishery. There is a viable fishery based on existing rights, hatcheries and water flows.[88]

Although the Tribe would prefer obtaining a right to water now decreed to others instead of fully utilizing hatcheries, its fishery expert testified that hatcheries largely could sustain a viable fishery.[89] Also, the same witness admitted that Pyramid Lake cannot be restored

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[86] The record shows that the claimed senior fish right cannot be imposed on the Truckee River without conflicting with existing water rights decreed in *Orr Ditch*. Tr. 6655-56, 6660, 6665, 6676, 6690, 6691, 6751-58, 7192. For example, the imposition of the fishery right would cause a severe water shortage in the Reno-Sparks area (Tr. 6679-83; Ex. A-13) and disaster to the Newlands Project. Tr. 6665-66, 7842-60, 8227, 8231-34, 8238-40, 8244-45. The Stillwater National Wildlife Refuge would be virtually destroyed. Tr. 7674, 7710. The District Court found that the plaintiffs had failed to sustain their burden of proof that the asserted fishery right would not harm the rights vested under the *Orr Ditch* Final Decree. Nev. App. 191a.

[87] Lake Mead and Lake Mohave, which are closer to larger centers of population, such as Los Angeles and Las Vegas, are the largest and the Truckee River is third.

[88] *See* Nev. Brief at 49 n.65.

[89] He cited his principal study area, Bear Lake (Tr. 2366), which has little hope for additional natural spawning. Tr. 2401.

to its aboriginal condition and conceded, in fact, that he knows of no lake that has been totally restored. Tr. 2444.[90]

The record also shows that the level of Pyramid Lake presents no current problem for the fishery.[91] Fluctuations in the Lake do not harm the fishery (Tr. 5664-5666), because changes in the littoral zone at the Lake do not affect the food chain. Tr. 5600-5601.[92]

The record also contradicts the Tribe's contention that its sustenance and survival depend on the fishery. In view of the large area in the Reservation (475,000 acres of land) and the small population residing there,[93] the

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[90] There is a veiled suggestion in the Tribe's brief to the effect that the lake sucker known as the Cui-ui at Pyramid Lake presents a problem in this case aside from that of the cut-throat trout fishery. The fish expert presented by the Tribe said that he was there to promote the cutthroat fishery. Tr. 2427, 2429; Ex. U-580. The trout was also the only species of fish mentioned in either complaint. Nev. App. 151a; JA 9. Nowhere in the course of the trial did the United States or the Tribe seek to present a case for a Cui-ui fishery. If conditions are adequate for survival and natural spawning of the cutthroat trout, conditions will be adequate likewise for the Cui-ui. Tr. 2135, 2151-2152, 2252, 2305. Therefore, the extensive evidence in the record in respect to the cutthroat trout suffices to indicate that the Cui-ui can and will thrive under present conditions.

[91] Tr. 2205, 5604-5605, 5618, 5624-5646, 5664, 5823-5824; Exs. A-4, A-5, A-6, A-7.

[92] The District Court is unchallenged in its finding that the Lake level is now relatively stable. Nev. App. 183a. Because the Lake is at the terminus of the Truckee River, there will necessarily be temporary fluctuations in the lake level during the flood and drought periods. The only conceivable economic reason to maintain the Lake at any fixed level would be to construct resort casinos there, but Lake Mead with its floating marinas and fine fisheries demonstrates that a stabilized lake level is not necessary even for that purpose. The application of res judicata in light of the foregoing presents no hardship or unfairness to the Indians.

[93] The record indicates that the highest population of the Reservation at any period was about 900, and that since then the

Pyramid Lake Paiute Tribe has an excellent potential economic base of income and resources, without the necessity of taking water away from existing uses to provide additional fishing water for the Tribe. Nev. App. 182a; Ex. U-586. This economic potential and success have been achieved under the administration of the *Orr Ditch* Final Decree.[94]

CONCLUSION

For all of the reasons set forth above and in our Brief for Petitioner in No. 81-2245, we respectfully urge the Court to affirm the judgment of the Ninth Circuit in regard to all defendants except TCID and to reverse as to TCID.

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population has ranged from about 400 to about 600, with the number of Indians at most times being approximately 500—about 200 of whom have been adults. JA 264, 273, 277, 495, 547.

[94] The Indians have approximately 1,000 acres under cultivation and 450-550 acres used for pasture and partially irrigated. Tr. 5418-19. They have a first right on the Truckee River to irrigate the 5,875 acres on their Reservation. These acres have been found to be susceptible of irrigation. Some 4,325 acres, although not yet used, remain for potential deevlopment. Nev. App. 56a-58a. The agricultural outlook is good for the 50 Indian farmers on the Reservation. Tr. 5422. Under present water rights conditions, the Indians also have a multitude of other economic benefits and ventures in operation: fishing licenses and boating fees produce substantial revenues; deposits of sand and gravel produce large royalties; geothermal leases and a trailer park produce additional revenue. Ex. U-586. To all of this must be added recent Government awards and grants to the Tribe running into many millions of dollars. Exs. G-32, V-439; Nev. App. 190a.

The foregoing shows that the Indians are able to hold their own in the civilized world—the specific objective sought by the Commissioner of Indian Affairs during the *Orr Ditch* case. JA 436-437.

Respectfully submitted,

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APPENDIX A

EXHIBIT A-360

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Washington

Office of the Commissioner

February 14, 1925.

Mr. E. B. Meritt,
Assistant Commissioner,
Office of Indian Affairs.

My dear Mr. Meritt:

This will acknowledge receipt of your letter of February 7 with copy of letter dated January 20 received by your office from Superintendent Jenkins of the Reno Indian Agency.

In my letter of February 5 your office was advised that the plans for the Spanish Springs development do not contemplate enlargement of the Truckee Canal. It is proposed merely to utilize the Truckee River water, a large part of which is flood flow, for the irrigation of additional lands, to supplement the deficient supply now furnished to certain lands, and to utilize to a more complete extent the full capacity of the Truckee Canal. As pointed out in the letter mentioned, we are not unmindful of the necessity for preserving fish life in connection with both the Truckee River and Pyramid Lake.

As you are no doubt aware, there is now pending in the U.S. District Court for the District of Nevada a suit having for its object the adjudication of the water rights of the Truckee River. In this suit the rights of the Newlands project, as well as those of other water users

from the stream system, including the rights of the Indians, have been set up and will be fully determined by the court. Until the respective rights are ascertained and fixed by order of court, no one, I believe, can say with certainly precisely what rights the Indians are entitled to enjoy, and the same may be said of the other claimants. This Bureau has at all times endeavored to recognize and to refrain from interfering in anywise with the rights of the Indians, in so far as they may be determined at the present time.

I believe it is possible that Superintendent Jenkins has an imperfect understanding either of the physical conditions or of the legal rights involved. It is difficult to conceive, for example, how the Indians could maintain a suit for damages against the Government, even though the rights of the Indians had been violated. Mr. Jenkins and the Indians apparently attribute their recent water shortly wholly or chiefly to action of the Bureau of Reclamation and its officials in diverting water into the Truckee Canal for use on the Newlands project. They manifestly overlook the fact that during several months of the season just past there was no water whatever in the Truckee River except such as was pumped from Lake Tahoe at the expense of the Bureau and of the Truckee Meadows water users. This was stored water, to which the Indians could of course assert no valid claim whatsoever, and yet because of the desire to preserve fish life and to divide the available supply in the river, a liberal portion of the small amount available was allowed to flow past the Derby Dam for use by the Indians and others below, who contribute nothing to the expense of pumping the stored water from the Lake.

For your information I have given somewhat at length this account of conditions as we understand them. I believe it superfluous to add that this Bureau will carefully guard against taking any action which would impair the

right of the Indians to waters of the Truckee River for fishing or for other beneficial uses.

Very truly yours,

/s/ Elmore Mead
Commissioner

APPENDIX B

EXHIBIT U-543
pp. 23, 24, 26, 28, 80

PYRAMID LAKE INDIAN RESERVATION

HEARINGS
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
HOUSE OF REPRESENTATIVES
SEVENTY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 24

AN ACT TO AUTHORIZE THE SECRETARY OF THE INTERIOR TO ISSUE PATENTS FOR CERTAIN LANDS TO CERTAIN SETTLERS IN THE PYRAMID LAKE INDIAN RESERVATION, NEV.

MAY 20 AND 21, 1943

Printed for the use of the Committee on Indian Affairs

[SEAL]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1943

* * * *

STATEMENT OF ALBERT ALEC, CHAIRMAN TRIBAL COUNCIL, PYRAMID LAKE RESERVATION

Mr. ALEC. Mr. Chairman and gentlemen of the committee, this is the first opportunity we have had under the reorganization act to have a word in a matter like this. I will read our statement on it [reading]:

* * * *

It is not possible to increase the number of acres of good tillable irrigated land materially. There are actually 3,130 acres of land under the ditch, but experience has shown that much of this land is not suitable for crop production, being too alkaline or too light and sandy. There are approximately 1,000 acres of this type. Then there are about 1,500 acres of timber land mostly adjacent to either side of the river. It is dangerous from the standpoint of water erosion to put this land in cultivation, because when the trees and natural cover are removed the river, during high water, washes the soil away to the lake. Some of this land right on the river bank has been cleared and put into cultivation with the result that last year 5 acres were lost and this spring at least 10 acres have been lost. Another thing too is the expense of subjugating this land to put it in shape for irrigation. The 3,130 acres mentioned above means land under the main ditches. It does not mean that laterals have been built to get water to it.

* * * *

STATEMENT OF ALBERT MAUWEE, SECRETARY, PYRAMID LAKE RESERVATION TRIBAL COUNCIL

Mr. MAUWEE. Mr. Chairman and gentlemen of the committee: We are located along here [indicating]. There is water erosion and wind erosion in all of this territory. In here [indicating] is what they call condemned land which is not good to anyone. Our lake water is salt water and all of this stuff here [indicating]

bench stuff has been included in our 3,000 acres allotment * * *.

* * * *

The CHAIRMAN. Didn't the courts out there decree the amount of water? Isn't the amount of water measured by the court as to the amount of land that you have?

Mr. MAUWEE. Yes; I guess they do.

The CHAIRMAN. Is that the situation, or otherwise?

Mr. ALEC. There is more water than the land we have. That water decree includes other land such as that which is alkali.

* * * *

The CHAIRMAN. We heard from the Indians that they did have surplus water. They said that if the white settlers sold their water rights that have been used for the land in dispute, that they, the Indians, had surplus water up above.

Mr. COLLIER. It is water which has been decreed to them which they can transfer to the land.

The CHAIRMAN. Now, is it your contention that the water rights along this river were decreed as early as 1859 to the Indians?

Mr. COLLIER. Decreed as of 1859.

The CHAIRMAN. To the Indians.

Mr. COLLIER. To the Indians. They have the absolute prior water right to the whole valley.

Mr. GILCHRIST. Have you the decree there so that it can be put in the record?

Mr. COLLIER. I have a copy of the decree with me. It was an extremely voluminous document dealing minutely with the water rights of everybody in the whole valley.

The CHAIRMAN. That is the decree of the Federal court.

Mr. DIMOND. I did not understand your last statement. Will you kindly repeat it? I did not understand your final statement about the decree.

Mr. COLLIER. The decree is a huge document.

Mr. DIMOND. Where can you find it? Maybe you have already stated it.

Mr. COLLIER. I have a copy with me.

Mr. DIMOND. Is it a judicial decree or judgment of the court?

Mr. COLLIER. It is one of the stipulated joint decrees, not yet made final, and it has been operative since 1926.

Mr. DIMOND. Why do you say it is not final?

Mr. COLLIER. It is operative.

Mr. DIMOND. Why do you say it is not yet final?

Mr. COLLIER. It just has not been made final by the court. It has not been made final by the court but it is the basis of all claims of anybody.

* * * *

APPENDIX C

Exhibit Number		
A-4	Offered	7465
	Admitted	7466
A-5	Offered	7465
	Admitted	7466
A-6	Offered	7465
	Admitted	7466
A-7	Offered	7465
	Admitted	7466
A-13	Marked	6750
	Admitted	6782
A-14	Offered	7202
	Admitted	7203
A-16	Offered	7226
	Admitted	7227
A-17	Offered	7228
	Admitted	7230
A-19	Offered	7230
	Admitted	7230
A-338	Offered	4501
	Admitted	4583
A-360	Offered	4501
	Admitted	4583
A-70002	Offered	5033
	Admitted	5035
A-70003	Offered	5043
	Admitted	5044
A-70009	Offered	5039
	Admitted	5041
A-70101	Offered	5075
	Admitted	5094

Exhibit Number		
A-70427	Offered	7214
	Admitted	7218
A-70428	Offered	7218
	Admitted	7220
A-70429	Offered	7220
	Admitted	7222
A-70430	Offered	7222
	Admitted	7224
A-70502	Offered	4052
	Admitted	4057
A-99010	Offered	240
	Admitted	241
B-512	Offered	406
	Admitted	406
B-515	Offered	408
	Admitted	408
G-32	Offered	7879
	Admitted	7888
U-229	Offered	8572
	Rejected	8588
	Listed	8620
	Admitted	9172
U-259	Admitted	9172
U-543	Offered	9200
	Admitted	9205
U-580	Offered	2154
	Admitted	2157
	Admitted	2264
U-586	Offered	555
	Admitted	655
V-439	Marked	1017
	Admitted	1018